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No. 1294

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

D/S A/S SVERRE,

Petitioner,

v.

TEXPORTS STEVEDORE, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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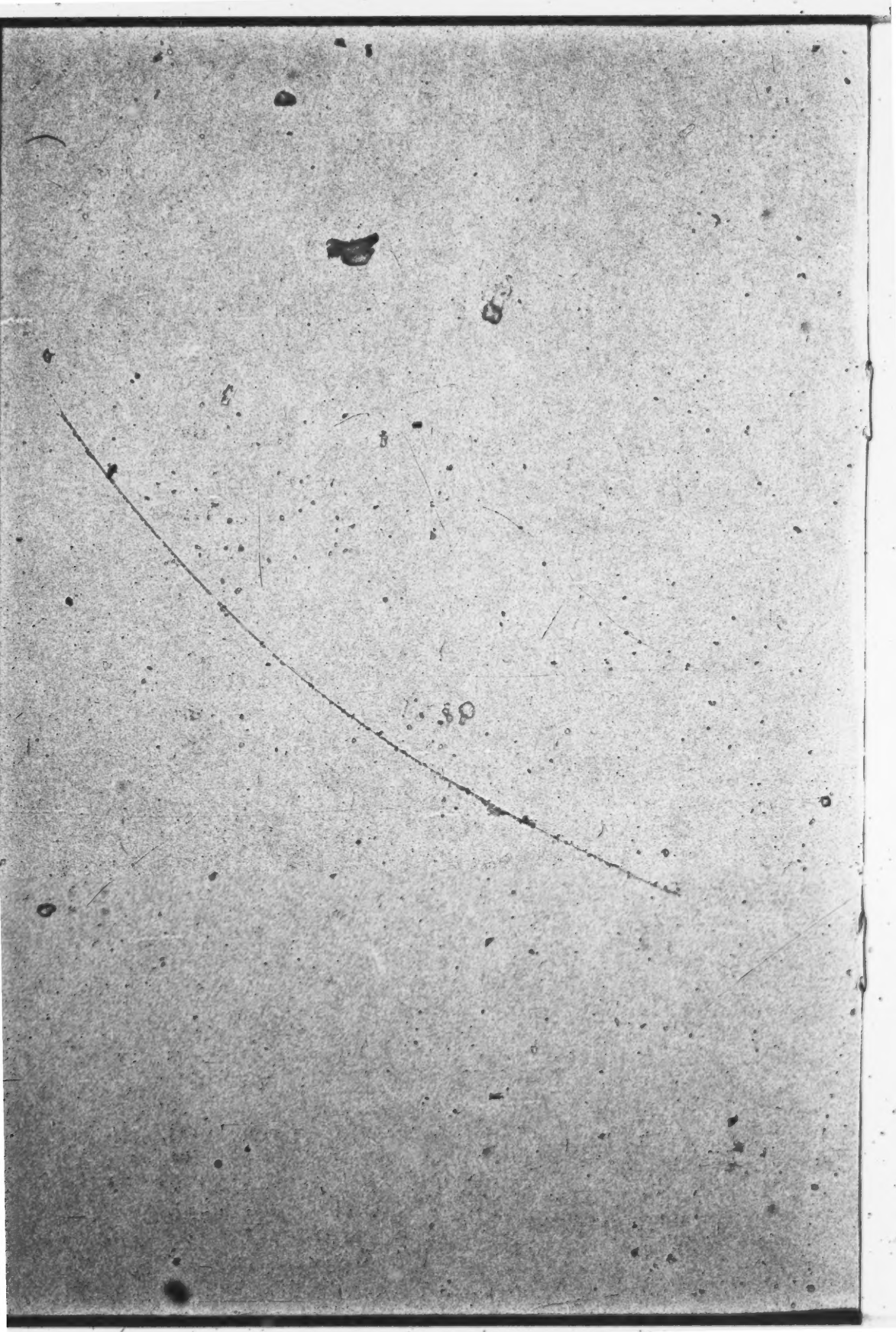

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TO THE HONORABLE JUDGES OF SAID COURT:

QUESTION PRESENTED

Despite the Petitioner-Shipowner's attempts to convert the single question presented by its Petition into three "questions of law", it remains as it has been from the date the two issues involved in an indemnity action such as this were first spelled out by this Court, a purely fact issue, the resolution of which rests solely in the hands

of the trier of facts. The single question presented by the Petition herein is:

> Did the Courts below correctly hold on the facts that the Petitioner-Shipowner's default—furnishing a negligently designed and constructed accessway which was the real cause of the accident—was conduct sufficient to preclude its recovery of indemnity from the Respondent-Stevedore?

The facts of this case compel an affirmative answer to this question and a denial of the Petition herein.

REASONS FOR DENYING THE WRIT

1.

There are no questions of law presented by the Petition, and as only factual issues which are of consequence only in this particular case are involved, the Petition does not satisfy any of the criteria for certiorari set forth generally in Rule 19 of this Court.[1]

2.

The Petition does not present any unresolved important question of general interest in the field of maritime law.[2]

3.

The decision of the Court of Appeals below followed the dictates of this Court that in these shipowner-stevedore indemnity cases ". . . . liability should fall upon the

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1. Discussed, *infra*, pages 12 to 14.

2. Discussed, *infra*, pages 14 to 16.

party best situated to adopt preventive measures and thereby reduce the likelihood of injury", thus "placing the burden ultimately on the company whose default caused the injury . . . ."[3]

4.

Petitioner's claim that there is a conflict between the decisions of the Court of Appeals below and the decisions of the Courts of Appeals of the Second, Fourth and Ninth Circuits is without foundation, as a brief consideration of the cases relied on by Petitioner clearly demonstrates.[4]

ADDITIONAL STATEMENT OF THE CASE

Prior History

The Petitioner-Shipowner in this case has already had a most unique experience in American jurisprudence. Because it elected to try the basic case against it by the injured longshoreman without seeking indemnity from the Respondent-Stevedore in the same suit, the shipowner has had its contentions that the stevedore was the party who really caused this unfortunate accident heard by two different fact finders—the jury in the trial of the basic case and the Judge in the trial of the indemnity action which is the basis of its Petition herein. In each separate trial, the shipowner contended, as it does here, that it was really the stevedore's fault because it did not properly supervise the men in permitting them to go into the hold before there was sufficient light for them to use the ac-

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3. Discussed, *infra*, pages 16 to 21. Quoted language is from *Italia Societa v. Oregon Stevedoring Company, Inc.* 1964, 376 U.S. 315, at 324, 11 L.Ed.2d 732, at 740, 741, 84 S.Ct. 748.

4. Discussed, *infra*, pages 21 to 32.

cessway with reasonable safety. In the trial of the basic case where only the injured longshoreman and the shipowner were parties, the jury decided that the real cause of this accident was:

The Shipowner's Negligently Designed Or Constructed Accessway.[5]

Having had liability imposed on it solely because of this negligently designed or constructed accessway, the Petitioner-Shipowner paid off this judgment and filed the present indemnity action against the Respondent-Stevedore in which it again asserted it was the stevedore's fault in permitting the men to go into the hold when the light was inadequate. While these contentions of the shipowner had already been considered and rejected by the jury who tried the basic case between the injured longshoreman and the shipowner, nevertheless the Trial Court below, some four years after the jury verdict, reconsidered exactly the same evidence that had been submitted to the jury, made its own independent findings of fact based on that same evidence and reached precisely the same result that the jury had reached—that the real cause of this accident was:

The Shipowner's Negligently Designed And Constructed Accessway.[6]

Thus, the jury found that the Petitioner-Shipowner had to respond in damages because of its negligently designed

5. P.R. 187. As it may be necessary to refer to the printed record, the original record and the deposition testimony in this case, we will for convenience in citing record references hereafter use the designation "P.R." for the printed record, "O.R." for the original record and "Depo." for the depositions introduced.

6. P.R. 203.

and constructed accessway, and in so doing rejected the contentions made against the Respondent-Stevedore. Likewise, in the present action the Courts below found that the shipowner could not pass on to the Respondent-Stevedore the damages it had paid because of its own negligently designed and constructed accessway because:

1. The Stevedore had not breached its warranty of workmanlike service since the injured longshoreman needed no additional supervision or instruction and because the light was in fact sufficient to permit the longshoreman to use the accessway with reasonable safety (P.R. 202)

and

2. Because the default of the shipowner in furnishing such a negligently designed and constructed accessway was conduct sufficient to preclude the shipowner from recovering indemnity. (P.R. 203)

The Court of Appeals below in a *per curiam* opinion affirmed these fact findings because the Trial Court's fact finding that the shipowner's conduct was sufficient to preclude a recovery of indemnity was not clearly erroneous. (P.R. 216)

The Negligent Design And Construction Of The Accessway

For the Court to have a clear picture of the basic negligent design and construction of the accessway, although this fact is accepted by the Petitioner-Shipowner here, we think some details would be helpful in order that the Court might know the subtleties of the design and construction which both the jury in the basic trial and the Courts below in this case found to be the real cause of this accident.

While all of the longshore witnesses had seen ladders inside housings or trunks such as was involved in this case, all of them testified that they had never seen ladders constructed as these were with two different types of ladders offset as they were at the 'tween deck level. The shipowner's Petition tries to create the impression that the injured longshoreman himself had no real knowledge of why he fell and thus no one really knows.[7] Yet it is not at all difficult from the injured longshoreman's testimony and the negligent design and construction of the accessway to reconstruct what occurred. It was the theory on which the injured longshoreman tried his case before the jury and obtained a verdict of a negligently designed and constructed accessway and it is the manner in which the Courts below concluded that the accident occurred as well.

It was the injured longshoreman's testimony that everything appeared to be in proper order to him including the amount of light available for his use until he got down to the last rung on the upper ladder. This would put him at the doorway leading from the accessway to the 'tween deck with both feet on the last rung of the upper ladder. The photograph on the opposite page shows this last rung clearly. At this time the injured longshoreman observed the fixed bar across the doorway which prevented him from remaining in a standing position and stepping out on to the 'tween deck. This fixed bar is also plainly shown on the photograph on the opposite page.

Since it looked like it was going to be a tight squeeze to get under this fixed bar, the injured longshoreman decided to take one more step down and when he did so, his foot came to rest on something that felt the same way that the rungs on the upper ladder had felt including the

7. Petition, page 6.

Note: The white line through the picture is a tape measure and was not present at the time of the accident.

distance between the rungs. He identified on one of the exhibits at the trial the point where he apparently placed his left foot. The place where he had placed his left foot as identified by the injured longshoreman was the four inch rounded side piece of the lower hold ladder. This is clearly shown on the photograph on the opposite page. With his left foot on this rounded side piece of the lower hold ladder, and thinking it was another rung on the upper ladder on which he was descending, the injured longshoreman started to bring his right foot and right hand down to complete his movement one rung further down on the ladder to permit him to go under the fixed bar, and as he did so, his left foot slipped in towards his right foot. (P.R. 25) When his left foot slipped in towards his right foot, with his right hand and right foot off of the ladder, he fell into the lower hold. (P.R. 24-27)

While admittedly the injured longshoreman did not know precisely what had happened after his fall because of his unconsciousness as shipowner contends, his description of what occurred, his identification of the only thing that he could see that his left foot could have been placed on to cause it to slip in toward the right as it did, makes it clear, as the jury and the Courts below concluded, that this is in fact what occurred.

What precisely was the evidence with respect to what was wrong with the design and construction of this accessway? A consulting engineer who at one time had worked for the Navy as a naval architect testified at the initial trial. He testified seven things were wrong with the design and construction of this accessway.[8]

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8. These seven things were:
   1. The fixed bar across the doorway at the 'tween deck level reduced the opening which was useable in getting off of the

Last rung
upper ladder—round rung
construction

Rounded side angle
frame lower hold ladder

First rung
lower ladder—flat rung
construction

While admittedly three of these items of negligent design and construction might not have had any substantial

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ladder onto the 'tween deck to 37 inches. This was too small as a man had to stoop to get under it and the opening should have been large enough to permit a man to stop on and off of the ladder in an upright position. This fixed bar made this impossible. The fixed bar and how it reduced the size of the doorway is shown in the photograph on page 7, supra. (P.R. 160)

2. Proper safety standards called for uniform rung spacing which should be uninterrupted all the way into the lower hold and of the same construction. The upper ladder here had 11 inches between rungs but there was a 15 inch space between the last rung of the upper ladder and the first rung of the lower ladder. The side angle piece on the lower ladder on which Maples placed his left foot was approximately 11 inches below the lowest rung of the upper ladder—the same spacing contained in the upper ladder. This difference in spacing and the difference in the type of construction of the upper and lower ladders is clearly shown in the photograph on page 9, supra. (P.R. 160)
3. The side angle frame of the lower hold ladder is located directly below the left four inches of the upper ladder rungs so if a man steps down onto the angle frame it would feel like he had it on a rung. This is precisely what Maples testified occurred. This can be seen clearly in the photograph on page 9, supra. (P.R. 161)
4. The useable width of the rungs on both the upper ladder and the lower hold ladder should be the same but the rungs on the upper ladder here were 14 inches wide whereas the rungs on the lower ladder were only 10 inches wide. This can be seen in the photograph on page 9, supra. (P.R. 161)
5. The width of the rungs on both the upper and lower ladders were too short. The Society of Marine Architects and Naval Engineers call for a minimum width of ladder rungs to be 18 inches. In this case the upper rung was 14 inches and the lower rung only 10 inches. (P.R. 161)
6. The trunk or tunnel in which the ladder was located was too small with the minimum recommended being 30 inches whereas this one was only 21 inches. (P.R. 161)
7. The lower hold ladder should also have had a trunk around it. (P.R. 161)

bearing on this accident,[9] the other four[10] were undoubtedly what caused both the Trial Court and jury upon hearing the same evidence approximately four years apart to conclude that it was the negligent design and construction of the accessway which caused this man's unfortunate accident. The fixed bar, the lack of uniform rung spacing, the difference in the construction and the useable widths of the rungs of the two ladders and particularly the location of the side angle frame of the lower hold ladder directly below the rungs of the upper ladder are the four items of negligent design and construction which actually caused this accident.

The evidence also indicates that there were some relatively simple and inexpensive corrective measures that could have been taken by the Petitioner-Shipowner that would have substantially eliminated all four of these risks.[11]

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9. Items 5, 6 and 7, Footnote 8, *supra*.

10. Items 1, 2, 3, and 4, Footnote 8, *supra*.

11. These corrective measures were:
    1. Replace the fixed bar with a chain or a moveable bar so the full opening would be available for a man to step off of the ladder in an upright position at the 'tween deck level. (P.R. 161)
    2. A welder with a cutting torch in an hour's time could move the upper ladder so that it would have been in line with the lower hold ladder and at the same time corrected the difference in the rung spacing between the upper and the lower ladders. (P.R. 161)
    3. With a hack saw or a cutting torch the projecting upper portion of the angle iron side piece on the lower ladder on which Maples placed his left foot could be removed. The realignment of the upper ladder, the correction of the rung spacing and the removal of the top part of this angle iron side piece would have forced a man to place his foot on the first rung of the lower hold ladder and not on the rounded side piece as Maples did in this instance. (P.R. 161)

The total cost of these simple corrective measures was estimated at $55.00 to $80.00.[12]

With these basic defects in the accessway, it was in effect a trap which was so subtle that even the Petitioner-Shipowner's own expert from New York testified that these defects would not cause him to advise the stevedore not to use the ladder.[13]

With this explanation of the facts, which we believe compelled the Courts below to hold that the Petitioner-Shipowner's default in furnishing such a negligently designed and constructed accessway was conduct sufficient to preclude its recovery of indemnity from the Respondent-Stevedore, we move on to discussion of the reasons why Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

ARGUMENT

Only Fact Question And No Questions Of Law Presented By Petition

The Petitioner seeks to have this Court consider a question which it has declared from its very inception to be a fact issue to be determined by the trier of facts. This Court made it clear that the issue of whether the shipowner's conduct was sufficient to preclude indemnity, was a fact issue in the very case in which this reciprocal obligation of the shipowner to the stevedore was first stated by this Court. This was in the *Weyerhaeuser* case[14]

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12. O.R. Vol. V, 272-273.

13. O.R. Vol. VI, 394-395.

14. *Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc.*, 1958, 355 U.S. 563, 2 L.Ed.2d 491, 78 S.Ct. 438.

when this Court stated both what the two issues were in an indemnity action arising under its earlier decision in the *Ryan* case[15] and that these were both fact issues, and not questions of law as Petitioner contends. It did so in this concise language:

> ". . . . If in that regard respondent (stevedore) rendered a substandard performance which led to foreseeable liability of petitioner (shipowner), the latter (shipowner) was entitled to indemnity absent conduct on its (shipowner's) part sufficient to preclude recovery. *The evidence bearing on these issues . . . . was for jury consideration under appropriate instructions.*"[16] (Parenthetical expressions and emphasis added)

It was not until the Petitioner filed its Petition in this Court that it made any contention that these issues involved questions of law rather than questions of fact. It not only did not make such a contention in the Court of Appeals below but in its brief in that Court, Petitioner refers to these two issues jointly as "critical issues of fact."[17] And in referring specifically to the Trial Court's fact finding that the Petitioner-Shipowner's conduct was sufficient to preclude indemnity, Petitioner contended "that the evidence in the case does not support these factual premises by the Trial Court."[18]

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15. *Ryan Stevedoring Company, Inc. v. Pan-Atlantic Steamship Corporation*, 1956, 350 U.S. 124, 100 L.Ed. 133, 76 S.Ct. 232.

16. *Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc.*, 1958, 355 U.S. 563, at 563, 2 L.Ed.2d 491, at 494, 78 S.Ct. 438. This has been the uniform holding in this and the lower federal courts ever since.

17. Petitioner's (Appellant's) Brief in Court of Appeals, page 17.

18. Petitioner's (Appellant's) Brief in Court of Appeals, page 44.

In fact, Petitioner's entire argument in the Court of Appeals below[19] was devoted to trying to convince that Court that the Trial Court's findings of fact that the Respondent-Stevedore did not breach its warranty of workmanlike service and that the Petitioner-Shipowner's conduct was sufficient to preclude its recovery of indemnity were clearly erroneous within the meaning of this Court's holding in the *McAllister* case.[20]

Thus what Petitioner accepted in both of the Courts below—that both breach of warranty and conduct sufficient to preclude indemnity are fact issues, as this and countless lower Federal Courts have held—it now seeks to turn into questions of law in an attempt to obtain a factual review by this Court.[21]

As only a fact question is presented by the Petition, it is respectfully submitted that it does not satisfy any of the criteria for certiorari set forth generally in Rule 19 of this Court, and should be denied.

No Unresolved Important Question Of General Interest Is Presented

The Petitioner advances only two reasons for granting the writ.[22] The first is that the case allegedly presents unresolved questions of Federal law having importance to the maritime industry. While it is true that there is a large

19. Petitioner's (Appellant's) Brief in Court of Appeals, pages 17-45.

20. *McAllister v. The United States,* 1954, 348 U.S. 19, 99 L.Ed. 20, 75 S.Ct. 6.

21. Petition, page 5.

22. Petition, pages 4-5. The second reason alleged in the Petition, that there is a conflict in the decisions of the Courts of Appeals, is discussed, *infra,* pages 21 to 32.

volume of indemnity actions arising out of injuries to longshoremen and other harbor workers, it does not follow from this large volume of litigation, that this case presents an important question of general interest in the field of maritime law. In fact, precisely the opposite is true, for there is no question presented by the facts of this case, the resolution of which would be of any real assistance to the lower courts in making factual determinations on a stevedore's breach of warranty and on a shipowner's conduct which is sufficient to preclude indemnity. It can have no general significance or import in this field of the law for the simple reason that the facts in this case are unique—unique because the real cause of this accident was the Petitioner-Shipowner's conduct in furnishing a negligently designed or constructed accessway.

Of the many cases decided by the Federal Courts in this field of indemnity, counsel for the Respondent-Stevedore does not recall a single other case in which a shipowner's negligently designed or constructed equipment has been the basis of a shipowner's liability to an injured longshoreman, and where the shipowner has in turn sought indemnity from the stevedoring company. While counsel has not tried to go back and re-read all of the indemnity cases decided by all of the Federal Courts in the twelve years since these indemnity actions came into existence, counsel has reviewed his memorandum briefs of approximately eighty-eight (88) decisions from United States District Courts and of approximately eighty-five (85) decisions of United States Courts of Appeals, and the six (6) decisions of this Court. In this total of some one hundred seventy-nine (179) decisions, a total of one hundred fifty-six (156) different accidents were involved

and not a single one has been found which involved negligently designed or constructed equipment furnished by either the shipowner or the stevedore.

Thus, the facts in this case are so unique that they are not likely to recur with any frequency and a consideration of this case would not afford this Court an opportunity to establish any guidelines that would be of general use and application in this field of maritime indemnity law on the fact issue relating to the shipowner's conduct which precludes indemnity. It does not, therefore, present an unresolved important question of general interest in the field of maritime law.

Liability Was Correctly Imposed On Party Best Situated To Reduce Likelihood Of Injury And Whose Default Caused The Injury

Both the Trial Court and the Court of Appeals below, the former expressly and the latter by its *per curiam* affirmance of the Trial Court's holding on the preclusion issue followed this Court's admonition that in these shipowner-stevedore indemnity cases that

> ". . . . liability should fall upon the party best situated to adopt preventive measures and thereby reduce the likelihood of the injury", thus "placing the burden ultimately on the company whose default caused the injury."[23]

That this principle was followed by the Courts below in making their fact findings in this case is obvious from their reliance on an earlier decision by the Court of Appeals below in the *David* case in which the first above quoted

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23. *Italia Societa, Etc. v. Oregon Stevedoring Company*, 1964, 376 U.S. 315 at 324, 11 L.Ed.2d 732, at 740, 741, 84 S.Ct. 748.

phrase from *Italia* is incorporated verbatim.[24] On its facts *David* is substantially identical to the present case and is precisely the same in its application of the foregoing rule from this Court. This substantial identity of the facts can best be demonstrated by placing the findings of fact in the *David* case and the fact findings in this case side-by-side:

David	*This Case*
Findings of Fact by Jury	Findings of Fact by Judge
1. Shipowner's roller beam assembly was defective, so shipowner was liable to injured longshoreman.	1. Shipowner's accessway was defective because negligently designed and constructed so shipowner was liable to injured longshoreman.
2. Stevedore did not breach its warranty of workmanlike service even though some of its longshoremen were negligent.	2. Stevedore did not breach its warranty of workmanlike service even though the injured longshoreman was negligent.
3. Furnishing of defective roller beam assembly was conduct on part of shipowner sufficient to preclude indemnification.	3. Furnishing of negligently designed and constructed accessway was conduct on part of shipowner sufficient to preclude its recovering indemnity.

In following this Court's admonition that "liability should fall upon the party best situated to adopt pre-

24. *Waterman Steamship Corporation v. David*, 5 Cir. 1965, 353 F.2d 660, at 664, cert. denied, 1966, 384 U.S. 972, 16 L.Ed.2d 683, 86 S.Ct. 1863.

ventive measures and thereby reduce the likelihood of injury" thus "placing the burden ultimately on the company whose default caused the injury" in both this case and the *David* case the Courts below had to ask themselves this question:

> In order that liability might be placed on the company whose default caused the injury, was the Petitioner-Shipowner or the Respondent-Stevedore in the best position to adopt preventive measures and thereby reduce the likelihood of injury from the shipowner's negligently designed and constructed accessway?

There was but one responsible answer that the Courts below could make to this question:

> The Petitioner-Shipowner was not only in the best position to reduce or eliminate the likelihood of injury, it was the only one who would be permitted to correct the negligent design and construction of its own accessway. This for the simple reason that no stevedore would be permitted to come aboard and change the design or construction of a permanent ladder aboard a vessel such as this.

The Court of Appeals below, both in this case and in *David,* recognized that in circumstances such as those that existed in *David* where the shipowner furnished a defective roller beam device, and as exist in this case, with Petitioner-Shipowner furnishing a negligently designed and constructed accessway—where the shipowner is in fact the only one who is in a position to reduce or eliminate the risk of injury and its default was the real cause of the injury—the shipowner's conduct is sufficient to preclude it from recovering indemnity. To

hold otherwise is to hold that the stevedore is an insurer and a guarantor of any and all accidents that occur aboard a vessel. If this Court's rule that the shipowner must not be guilty of conduct sufficient to preclude indemnity before it can recover is to have any vitality at all, we respectfully submit that it must be applied as was done by the Court of Appeals below in *David* and as it was done by the Trial Court and the Court of Appeals below in this case.

The Courts below were doing nothing more than weighing the facts, and in weighing them deciding who was best able to eliminate the risk which caused this accident, thus whose default really caused the injury. The ease with which the Petitioner-Shipowner could have eliminated substantially all of the risk from the subtle defects in design and construction of this accessway is best demonstrated by the fact that the evidence showed that four simple corrective measures at a total cost estimated at only $55.00 to $80.00 were all that would have been required.[25]

Nor can the Petitioner-Shipowner contend that the risk of injury from its negligently designed and constructed accessway would have been eliminated had the stevedore simply kept its men from going into the hold until more light was present in the accessway. What the shipowner ignores here is the fact that both the injury in the basic case in which a recovery was awarded to the longshoreman solely on the basis of a negligently designed and constructed accessway and the Trial Court in this indemnity case found that there was "sufficient light for the access-

25. As to costs, O.R. Vol. V, 272-273. The simple corrective measures are discussed, *supra*, Footnote 11, page 11.

way and ladder . . . . to be used with reasonable safety and the stevedoring company did not breach its warranty of workmanlike service by permitting . . . . the . . . . longshoremen to use the accessway and ladder to descend to their place of work." (P.R. 202)

All of the rules announced by this Court relating to the two fact issues involved in these indemnity cases, breach of warranty and conduct sufficient to preclude, return in the final analysis to the basic, fundamental, underlying principle that liability should fall upon the party best situated to adopt preventive measures and thereby reduce the likelihood of injury in order that the burden ultimately may be placed on the company whose default was the real cause of the injury. When this principle was applied by the Courts below in this case, they reached not only a reasonable conclusion in placing the burden on the Petitioner-Shipowner, but the conclusion that was absolutely compelled by the facts.

To do otherwise, in the words of the Court of Appeals for the Ninth Circuit

> ". . . would place a premium upon unseaworthiness of the ship and negligence by her crew and officers. This . . . would reverse the maritime policy of ages, which has even firmer foundations under modern conditions."[26]

As the decision of the Court of Appeals below placed the liability in this case on the Petitioner-Shipowner whose default in furnishing a negligently designed and constructed accessway was the real cause of the injury, as this Court's decisions required it to do, it is respectfully submitted that the Petition should be denied.

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26. *United States v. Harrison*, 9 Cir. 1957, 245 F.2d 911, at 915.

No Conflict Exists Between Decisions Of Court Below And Courts Of Appeals Of Other Circuits

The second reason asserted by the Petitioner as a reason for granting the writ is its contention that the decision of the Court below "is in obvious conflict with the decisions by the Courts of Appeals in the 2nd, 4th and 9th Circuits on the same subject."[27]

The ruling of the Court of Appeals below to which Petitioner refers in this regard was its affirmance of the Trial Court's fact finding that as the real cause of this accident was the conduct of the Petitioner-Shipowner in furnishing the negligently designed and constructed accessway, that this conduct was sufficient to preclude its recovery of indemnity. This holding was based on an earlier decision of the Court of Appeals below, involving substantially identical facts in its *David* case.[28] Thus, in effect Petitioner contends that both the decision in this case and in the *David* case are in conflict with decisions cited from the other Court of Appeals.

The Petitioner's contention that a conflict exists is based on some statements from the other Courts of Appeals to the effect that the shipowner's conduct which is sufficient to preclude indemnity should "prevent or seriously handicap the stevedore in his ability to do a workmanlike job."[29] Many attorneys who practice in this field

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27. Petition, page 5.

28. *Waterman Steamship Corporation v. David*, 5 Cir. 1965, 353 F.2d 660, cert. denied, 1966, 384 U.S. 972, 16 L.Ed. 2d 683, 86 S.Ct. 1863. See comparison of facts, supra, page 17.

29. The six cases from the other Courts of Appeals which are allegedly in conflict based on this language are cited on page 8 of the Petition.

refer to this as the Albanese Doctrine.[30] As we will shortly demonstrate, the decision of the Court below in this case is not in conflict with the six decisions from these other Courts of Appeals as claimed by the Petitioner for the following reasons:

1. In each of the six cases cited there was a substantial and material breach by the stevedore of its warranty of workmanlike service, while there was absolutely no breach of its warranty by the Respondent-Stevedore in this case.

2. In all six of these cases the stevedore had full knowledge of the unseaworthy or dangerous condition which caused the injury, whereas the Respondent-Stevedore in this case had no knowledge of the subtle defects in the accessway which made it negligently designed and constructed and which was the cause of this accident.

3. In four[31] of the six cases, with knowledge of the unseaworthy or dangerous condition, the stevedore failed in its duty to correct the dangerous condition which caused the injury, while in this case the Respondent-Stevedore had no duty to correct the condition.

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30. For convenience we will hereafter so refer to it. As one might expect it got this name from the style of the case in which the statement was first made. *Albanese v. N.V. Nederl. Amerik Stoomv. Maats*, 2 Cir. 1965, 346 F.2d 481, at 484, reversed in part on other grounds and cert. denied in part, 1965, 382 U.S. 283, 15 L.Ed.2d 327, 86 S.Ct. 429, rehearing denied, 1966, 382 U.S. 1000, 1030, 15 L.Ed.2d 490, 544, 86 S.Ct. 534, 644. On re-trial of the fact issues on indemnity, the jury resolved all issues in favor of the stevedore, *Albanese v. Nederl. Amerik Stoomv.*, 279 F.2d 635 (S.D. New York, 1967).

31. See discussion of *Albanese* case, *infra*, page 24, of *Mortensen* case, *infra*, page 24, of *Old Dominion* case, *infra*, page 25, and of *H & H* case, *infra*, page 26.

4. In the other two cases[32] also with full knowledge of the unseaworthy or dangerous condition, the stevedore's negligent breach of warranty by using unsafe methods of operation was the real cause of the unseaworthy or dangerous condition becoming involved in the accident, whereas in this case the Respondent-Stevedore did not breach its warranty of workmanlike service to any extent.

Even though all six of these cases from the Courts of Appeals of the Second, Fourth and Ninth Circuits were decided prior to the oral argument in the Court of Appeals below in this case, and all but one of the cases from the Ninth Circuit and one of the cases from the Fourth Circuit were decided prior to the filing of Petitioner's brief in the Court of Appeals below, the Petitioner did not cite any of these six cases or any others relating to the Albanese Doctrine to the Court of Appeals below, and it made only two brief references to the Albanese Doctrine in its brief.[33]

Thus Petitioner-Shipowner's criticism of the decision of the Court of Appeals below as being in conflict with these decisions from the other Courts of Appeals is obviously nothing more than an afterthought. The Petitioner's complete failure to cite these cases in the Court below manifestly demonstrates what is in fact true—these decisions from the Courts of Appeals for the Second, Fourth and Ninth Circuits when applied to the facts of this case would also result in a denial of indemnity to the Shipowner and clearly are not in conflict with the de-

32. See discussion of *Calmar* case, *infra*, page 25, and of *Rederi* case, *infra*, page 26.

33. Petitioner's (Appellant's) Brief in Court of Appeals, pages 44, 45.

cision of the Court below. As briefly as possible as to each case relied on by Petitioner-Shipowner, the absence of any conflict with this case is easily demonstrated:

SECOND CIRCUIT:

1. The *Albanese* Case[34]—The stevedore breached its warranty of workmanlike service when it created the unseaworthy condition, noxious fumes in the hold, when it did not order its men out of the hold when the shipowner did not turn on its ventilating system, and when it did not use its own portable blowers to correct the unseaworthy condition the stevedore itself had created. Indemnity was allowed. In this case, Respondent-Stevedore did not breach its warranty of workmanlike service to any extent, had no knowledge of the dangerous condition and had no duty to correct it.

2. The *Mortensen* Case[35]—The unseaworthy condition, an oil slick on the vessel's deck, was created by the shipowner, but the painting contractor breached its warranty of workmanlike performance because it had full knowledge of this oil slick for almost two hours before the injury, had the duty to clean up any such condition in the work area, and had the equipment necessary to eliminate the unseaworthy condition but completely failed to do so. The shipowner's conduct in creating the unseaworthy condition did not preclude indemnity because of the intervening breaches of war-

34. *Albanese v. N.V. Nederl. Amerik. Stoomv. Maats*, 2 Cir. 1965, 346 F.2d 481, reversed in part on other grounds and cert. denied in part, 1965, 382 U.S. 283, 15 L.Ed.2d 327, 86 S.Ct. 429, rehearing denied, 1966, 382 U.S. 1000, 1030, 15 L.Ed.2d 490, 544, 86 S.Ct. 534, 644.

35. *Mortensen v. A/S Glittre*, 2 Cir. 1965, 348 F.2d 383.

ranty by the painting contractor. There was no breach of warranty by Respondent-Stevedore in this case intervening between the Petitioner-Shipowner's conduct and the accident, and the real cause of this accident was the Petitioner-Shipowner's negligently designed and constructed accessway.

FOURTH CIRCUIT:

1. The *Calmar* Case[36]—The unseaworthy condition, an unseized cargo light, was furnished by the shipowner. The stevedore was held to have breached its warranty of workmanlike service not only because its employee used a cargo light which he knew was unseaworthy, but because he threw it into the hold of the vessel in an unsafe manner. Without the stevedore's breaches of warranty no accident would have occurred, and indemnity was allowed. Here again, there was no breach of warranty by the Respondent-Stevedore in this case.

2. The *Old Dominion* Case[37]—The unseaworthy condition, a slippery syrupy substance, was present when the stevedore came aboard to commence work. The stevedore had full knowledge of the condition, and its failure to stop work and to remove the slippery substance when it had a duty to do so were both substantial breaches of the stevedore's warranty of workmanlike service. Indemnity was allowed. In this case, Respondent-Stevedore did not breach its warranty of workmanlike service, had no knowledge of the negligently designed

36. *Calmar Steamship Corporation v. Nacirema Operating Company*, 4 Cir. 1959, 266 F.2d 79, cert. denied 361 U.S. 816, 4 L.Ed.2d 62, 80 S.Ct. 56.

37. *Old Dominion Stevedoring Corp. v. Polskie Linie Oceaniczne*, 4 Cir. 1967, 386 F.2d 193.

and constructed accessway and had no duty to correct it in any event.

NINTH CIRCUIT:

1. The *Rederi* Case[38]—The unseaworthy condition, improperly stowed cargo, was brought into port by the shipowner. The stevedore with full knowledge of the improper stowage breached its warranty of workmanlike service in two substantial respects, by using an unsafe method to discharge the cargo and by failing to stop the work. Since these breaches by the stevedore were the real cause of the injury, the shipowner's conduct did not preclude indemnity. In this case there was no breach of warranty by the Respondent-Stevedore and the Petitioner-Shipowner's conduct was the real cause of the injuries.

2. The *H & H* Case[39]—The unseaworthy condition, a cargo hold in which flashlights were needed to inspect it, was created by both the shipowner and the stevedore. The stevedore had full knowledge of the need for flashlights in order to make its inspection and breached its warranty of workmanlike service when it attempted to inspect the hold without a sufficient number of flashlights for its men. The stevedore had the duty to correct the condition also and it was the absence of sufficient flashlights for which the stevedore was solely responsible which was the real cause of the accident. Indemnity was allowed. In this case, the Respondent-Stevedore did not

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38. *Rederi A/B Nordstjernan v. Crescent Wharf & Warehouse Co.*, 9 Cir. 1967, 372 F.2d 674.

39. *H & H Ship Service Co. v. Weyerhaeuser Line*, 9 Cir. 1967, 382 F.2d 711.

create the condition and did not breach its warranty of workmanlike service to any extent, and it was the Petitioner-Shipowner's conduct which was the real cause of the accident.

Thus insofar as the preclusion issue is concerned the Albanese Doctrine as applied in these cases simply means:

1. If an unseaworthy or dangerous condition is present, whether created by the shipowner or the stevedore,

and

2. If the stevedore has full knowledge of this condition,[40]

and

3. If the stevedore fails in its duty to correct the condition,[41] or if its breach of warranty is the default which caused the injury,[42]

then

4. The fact that the shipowner is liable to the longshoremen based on the unseaworthy or dangerous condition does not preclude its recovery of indemnity because the stevedore's breach of warranty is the default which was the real cause of the accident, but if it was the shipowner's default which was the

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40. In all six of the cases relied on by Petitioner-Shipowner as discussed above, the stevedore had full knowledge of the unseaworthy or dangerous condition.

41. The *Albanese, Mortensen, Old Dominion* and *H & H* cases, involved the stevedore's failure to perform its duty to correct the unseaworthy or dangerous condition.

42. The *Calmar* and *Rederi* cases involved the stevedores' negligent breach of its warranty by using unsafe methods of operation which was the real cause of the unseaworthy or dangerous condition becoming involved in the accident.

real cause of the injury, such conduct is sufficient to preclude its recovery of indemnity.

Applying these four aspects of the Albanese Doctrine to the facts of the present case reveals that precisely the same result as that reached by the Court of Appeals below is required by the Albanese Doctrine:

1. There was a dangerous condition which was created solely by the Petitioner-Shipowner.
2. The Respondent-Stevedore had no knowledge of the dangerous condition.
3. The Respondent-Stevedore had no duty to correct the dangerous condition and did not breach its warranty so that there was no default on its part which caused the accident.
4. The Petitioner-Shipowner's conduct in furnishing a negligently designed and constructed accessway was conduct sufficient to preclude its recovering indemnity, because its default, and not that of the Respondent-Stevedore, was the real cause of the accident.

Although the foregoing would seem to be sufficient to demonstrate that the conflict among the Courts of Appeals alleged by Petitioner does not exist, the absence of it is made even more apparent by other decisions of the Court of Appeals below. As previously stated, the earlier decision of the Court of Appeals below in its *David* case[43] when it held the shipowner's default in fur-

43. *Waterman Steamship Corporation v. David*, 5 Cir. 1965, 353 F.2d 660, cert. denied, 1966, 384 U.S. 972, 16 L.Ed.2d 683, 86 S.Ct. 1863.

nishing a defective roller beam assembly was the real cause of the accident and therefore was conduct sufficient to preclude indemnity, and in this case when it held the Petitioner-Shipowner's default in furnishing a negligently designed and constructed accessway was the real cause of the accident and therefore was conduct sufficient to preclude indemnity, are the cases which Petitioner claims are in conflict with the Albanese Doctrine cases.

The conflict which Petitioner alleges does not exist in the eyes of the Court of Appeals below which has been fully aware of the Albanese Doctrine and has cited it on several occasions with approval and as being in accord with its decision in *David*. And it not only has cited it with approval but in so doing, on at least three separate occasions, the Court of Appeals below has indicated that it does not consider the Albanese Doctrine to be in conflict with its holding in the *David* case.[44] Since this was the very case relied on by the Trial Court below in holding the Petitioner's conduct sufficient to preclude indemnity which holding was affirmed by the Court of Appeals below in its *per curiam* opinion, it is clear that the conflict alleged by Petitioner does not in fact exist insofar as the Court of Appeals below is concerned.

Even the *Matthews* case[45] from the Court of Appeals below cited by Petitioner[46] clearly demonstrates that the

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44. See: *Southern Stevedoring & Contracting Co. v. Hellenic Lines, Ltd.*, 5 Cir. 1968, 388 F.2d 267, at 272; *Comp. Anon. Venezolano de Navegacion v. Matthews*, 5 Cir. 1967, 371 F.2d 971, at 973; *D/S Ove Skou v. Hebert*, 5 Cir. 1966, 365 F.2d 341, at 350, petition for rehearing pending.

45. *Comp. Anon. Venezolano de Navegacion v. Matthews*, 5 Cir. 1967, 371 F.2d 971.

46. Petition, page 9.

Court below not only recognizes but applies the principles of the Albanese Doctrine as it is applied by the Courts of Appeals of the Second, Fourth and Ninth Circuits on which Petitioner relies. In the *Matthews* case the unseaworthy condition was a large quantity of loose dunnage (wooden boards) which was piled unevenly and loosely approximately 2 to 4 feet high and covered over with brown paper. When the stevedore became aware of this unseaworthy condition, the vessel's mate in charge of the cargo operation was asked to remove the dunnage or to permit the longshoremen to do so. The vessel's mate declined this request and ordered the longshoremen to work with this unseaworthy condition present.[47] In carrying cargo over the dunnage covered by paper as ordered by the vessel's mate, a longshoreman was injured when his legs went through the paper that covered a concealed hole or separation in the dunnage.

Petitioner recognizes that these facts in the *Matthews* case would require a finding of conduct sufficient to preclude indemnity under the Albanese Doctrine since the shipowner's default was the real cause of the injury. The Court of Appeals below so held and in doing so cited specifically its earlier decision in the *David* case[48] in which it held that where the real cause of a longshoreman's injury is the default of the shipowner, that

47. Petitioner's attempt to contend that this case differs from *Matthews* on the theory that the vessel's mate in *Matthews* determined the conditions under which the work was done but the stevedore determined them in the present case simply is not correct. This for the reason that it was the shipowner's own employees who told the stevedore's longshoremen that they should use the negligently designed and constructed accessway to go to their place of work in the vessel's hold. Thus working under the conditions which were the real cause of the injuries in both this case and in *Matthews* were determined by the shipowner.

conduct is sufficient to preclude a recovery of indemnity. In doing so in *Matthews* the Court below cited with approval *Albanese, Mortensen* and *Calmar,*[49] which are three of the six cases which Petitioner claims are in conflict with the *David* case and this case from the Court of Appeals below.

This again demonstrates that the Albanese Doctrine and the *David* rule of the Court of Appeals below are not only not in conflict but are in fact based on the same basic and fundamental premise—if the real cause of the accident is the shipowner's default it will be held to be conduct sufficient to preclude indemnity, but if it is the stevedore's breach of its warranty of workmanlike service which is the real cause of the accident, the shipowner will not be precluded from recovering indemnity even though it may have been negligent to some extent or its vessel found to be unseaworthy.[50]

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48. *Waterman Steamship Corporation v. David,* 5 Cir. 1965, 353 F.2d 660, cert. denied, 1966, 384 U.S. 972, 16 L.Ed.2d 683, 86 S.Ct. 1863.

49. Discussed, *supra, Albanese,* pages 24, *Mortensen,* page 24, and *Calmar,* page 25.

50. Nor is Petitioner correct in its assertion that this basic premise of these four different Courts of Appeals "is in probable conflict with the decisions of this Court in *Crumady v. The J.H. Fisser,* 358 U.S. 423, 3 L.Ed.2d 413 (1959), and *Waterman Steamship Corporation v. Duggan & McNamara, Inc.,* 364 U.S. 421, 5 L.Ed.2d (1960), allowing indemnity against a stevedore for bringing into play defective equipment supplied by the shipowner." (Petition, page 5) In both the *Crumady* and *Waterman* cases, the real cause of the accident in each case was the negligence of the stevedore which breached its warranty of workmanlike service and without the stevedore's default the unseaworthiness of the vessel would not have been involved in either accident. Both the Albanese Doctrine and the rule of the *David* case and of this case are in complete accord with the *Crumady* and *Waterman* cases. And as Petitioner acknowledges, in any event the preclusion issue was not involved specifically in either *Crumady* or *Waterman.*

Thus, the conflict alleged to exist between the decisions of the Court of Appeals below and those of the Second, Fourth and Ninth Circuits on the preclusion issue in these indemnity actions, does not exist in fact, simply because all four of these Courts of Appeals hold that the preclusion issue is to be decided on the basis of whose default was the real cause of the accident as this Court has directed them to do. There being no conflict, the Petition should be denied.

CONCLUSION

The Respondent-Stevedore respectfully submits that the Courts below correctly held the Petitioner-Shipowner responsible for this accident since its conduct was the real cause of the longshoreman's injury, and in so doing followed the dictates of this Court when it stated:

> ". . . . But we deal here with a suit for indemnification based upon a maritime contract, ... in an area where rather special rules governing the obligations and liability of shipowners prevail, rules that are designed to minimize the hazards encountered by seamen, to compensate seamen for the accidents that inevitably occur, and to minimize the likelihood of such accidents. By placing the burden ultimately on the company whose default caused the injury, ..., we think our decision today is in furtherance of these objectives."[51]

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51. *Italia Societa v. Oregon Stevedoring Co.*, 1964, 376 U.S. 315, at 324, 11 L.Ed.2d 732, at 741, 84 S.Ct. 748. The Court of Appeals below recently reiterated its continuing adherence to this principle when it said: "Our decision is in accord with the policy that the party should bear the loss whose default caused the damage and who was in the best position to minimize the risk to crew and cargo." *Southern Stevedoring & Contracting Co. v. Hellenic Lines, Ltd.*, 5 Cir. 1968, 388 F.2d 267 at page 272.

For this and all of the foregoing reasons discussed herein, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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May 2, 1968

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been served on counsel for the Petitioner, Edward W. Watson, Esq. and Messrs. Eastham, Watson, Dale & Forney, 521 U. S. National Bank Building, Galveston, Texas 77550, by depositing said copies in the United States Mail, first class postage prepaid, to the address shown above on this the 3rd day of May, 1968.

E. D. Vickery

Of ROYSTON, RAYZOR & COOK